

BEFORE THE STATE TAX APPEAL BOARD  
OF THE STATE OF MONTANA

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CHARLES E. WOLFE/	)	
MOUNTAIN PACK, INC.,	)	
	)	DOCKET NO.: IT-2000-4
Appellant,	)	
	)	
-vs-	)	FACTUAL BACKGROUND,
	)	CONCLUSIONS OF LAW,
THE DEPARTMENT OF REVENUE	)	ORDER and OPPORTUNITY
OF THE STATE OF MONTANA,	)	<u>FOR JUDICIAL REVIEW</u>
	)	
Respondent.	)	

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The above-entitled appeal was heard on November 16, 2001, in the City of Billings, Montana, in accordance with an order of the State Tax Appeal Board of the State of Montana (the Board). The notice of the hearing was duly given as required by law.

Mr. Charles E. Wolfe appeared and represented himself and Mountain Pack, Inc., (the Taxpayer). The Taxpayer presented testimony and exhibits which were received in evidence in support of the appeal. The Department of Revenue (DOR), represented by Douglas Peterson, Unit Leader, and Mary Bernhardt, auditor, presented testimony and exhibits which were received in evidence in opposition to the appeal. Mr. Wolfe is the appellant in this proceeding

and, therefore, has the burden of proof. Based on the evidence, the Board finds as follows:

#### **STATEMENT OF THE ISSUES**

Several issues are before the Board. The Taxpayer asserts that the Department of Labor illegally subpoenaed records from his bank and that this information was then illegally transferred from the Montana Department of Labor to the DOR where it was ultimately used to assess withholding tax and Old Fund Liability Tax (OFLT) against him. Additionally, the Taxpayer contends that, from this illegally obtained information, the DOR issued illegal Warrants for Distrainment against himself and the company. Finally, the Taxpayer claims he was not properly advised by the DOR of his appeal rights. Certain constitutional claims have been reserved by the Taxpayer and are properly not before this Board.

#### **FACTUAL BACKGROUND**

1. Due, proper and sufficient notice was given of this matter, the hearing hereon, and of the time and place of the hearing. All parties were afforded the opportunity to present evidence, oral and documentary.

2. The Board has jurisdiction over this matter in accordance with Section 15-2-302, MCA.

3. The Department of Labor, through its then Auditor, Mary Bernhardt, subpoenaed the Taxpayer's payroll records in 1995. After failing to obtain such records, the Department of Labor, again through its Auditor, Mary Bernhardt, subpoenaed records from the Taxpayer's bank.

4. The Department of Labor's Unemployment Insurance Division was merged into the DOR in July, 1997 and Auditor Mary Bernhardt transferred to the DOR.

5. Mary Bernhardt prepared and issued an estimated assessment to the Taxpayer on withholding and OFLT tax liabilities and mailed this to the Taxpayer in May, 1998.

6. Subsequently, two Warrants for Distrainment were issued and filed when the Taxpayer failed to pay his tax liabilities on October 30, 1998.

7. In November 1998, the Taxpayer was informed by the DOR that collection action on the account would be suspended until the Taxpayer had the opportunity to discuss the matter with the DOR.

8. In a letter dated March 17, 1999, the Taxpayer paid the sums agreed upon with the DOR to settle the matter and no sums are now owing. The Taxpayer's requested abatement of assessed penalty and interest was granted.

9. On April 14, 1999, the Warrants for Distrainment were released by the DOR.

10. A hearing was held on this matter on November 30, 1999 in Helena, Montana before David G. Olsen, DOR hearing examiner.

11. On May 22, 2000, the hearing examiner issued his decision on this matter stating that, given the relevant provisions of law as they apply in this case, it is simply not possible to abide by the conclusions advocated by the Taxpayer.

12. The DOR's final agency decision, adopting the hearing examiner's decision of May 22, 2000, was mailed to the Taxpayer on October 3, 2000.

13. The Taxpayer filed a timely appeal to this Board on October 27, 2000.

#### **TAXPAYER'S CONTENTIONS**

The Taxpayer contends the Department of Labor acted unlawfully when it subpoenaed payroll records for his company with an incorrect name and obtained these records illegally when it subpoenaed the records from his bank. The Taxpayer also contends that the transfer of these records to the DOR upon the merger of the Unemployment Insurance Division with the DOR was illegal. The Taxpayer asserts that the DOR further acted illegally when it issued and filed Warrants for Dstraint based on the unlawfully obtained information. Finally, the Taxpayer claims the DOR

failed to properly advise him as to his appeal rights. Because of this illegal activity, the Taxpayer claims the withholding and OFLT tax assessments were collected by the DOR unlawfully and under threat. The Warrants for Distrainment, released by the DOR in April, 1999, should be "rescind[ed] with prejudice. . . ." and, presumably, the collected taxes returned to the taxpayer.

#### **DOR'S CONTENTIONS**

The DOR contends that, while it may have made some errors in procedure or communication with the Taxpayer, Mr. Wolfe was not prejudiced thereby and properly owed and paid the settled tax assessments. Upon request, the DOR abated all penalties and interest. The DOR contends the records obtained by subpoena and transferred to the DOR were lawfully obtained and transferred, the Warrants for Distrainment properly issued and filed and that the Taxpayer then communicated and settled the matter with the DOR through payment of an agreed sum. Upon such payment, the DOR properly rescinded the Warrants for Distrainment. The DOR asserts the Taxpayer has appealed the matter in compliance with proper procedures, has not been denied any appeal rights and, therefore, has suffered no prejudice or loss on that issue. Finally, the DOR claims the Taxpayer was a proper officer and agent of his company to be charged and

assessed the unpaid unemployment and OFLT tax liability and that the matter was appropriately pursued and settled.

#### **BOARD'S DISCUSSION**

The Board is not the proper forum for a constitutional issue and has not considered such issue or issues in this matter.

Clearly, the Unemployment Division was empowered to issue and serve subpoenas, as is the DOR, and act on the information thereby obtained in pursuit of its statutory responsibility to collect appropriately assessed taxes. The employer is the Taxpayer in such cases. Mr. Wolfe, as the person responsible for the financial affairs of the corporation, was individually responsible for the payroll tax liability of the corporation. Methods of collection may include issuance of Warrants of Distrainment. If such warrants were filed prematurely in this case, they were not acted upon and were timely released upon settlement of the agreed tax assessment. Mr. Wolfe utilized all of his appeal rights and none were denied him by the DOR as a result of action or miscommunication by the DOR. Thus, the DOR properly pursued and collected the settled tax assessments in this case.

#### **CONCLUSIONS OF LAW**

1. Section 15-2-302, MCA. Direct appeal from department decision to state tax appeal board - hearing. (2)(a)

Except as provided in subsection (2)(b), the appeal is made by filing a complaint with the board within 30 days following receipt of notice of the department's final decision.

2. A governmental agency may obtain financial records from a banking institution via a subpoena if the subpoena is authorized by law and there is reason to believe the records sought are relevant to legitimate inquiry. 12 U.S.C. Section 3407.
3. Each employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with the withholding tax tables which shall be prepared and issued by the department. Section 15-30-202, MCA.
4. The Montana Department of Labor may issue subpoenas to obtain any books and records in relation to any investigation or proceeding concerning unemployment insurance. Section 39-51-301 (4), MCA.
5. Information obtained by the Department of Labor from any individual must be held confidential, except to public employees in the performance of their public duties. Section 39-51-603(3), MCA.
6. During the period of time covered by the audit, employers were required to pay workers' compensation old fund liability tax. Section 39-71-2503, MCA.

7. Employers are liable for amounts required to be deducted or withheld, and the amounts, plus interest due on the amounts, are a tax. With respect to the tax, the employer is a Taxpayer. Section 15-30-203 (1), MCA.
8. Employers are required to withhold Montana state income tax from the wages they pay to an employee for services within Montana, and for services rendered by a resident of Montana outside of Montana. ARM 42.17.111 (1).
9. The officer or employee of a corporation whose duty it is to collect, truthfully account for, and pay to the State the amounts withheld from the corporation's employees, who fails to pay the withholding to the State, is liable for the amounts withheld and for any corresponding penalty and interest. Section 15-30-203 (2), MCA.
10. The appeal of the Taxpayer is hereby denied and the decision of the Department of Revenue is upheld.

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**ORDER**

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the settlement of the tax assessment at issue shall be approved as made.

DATED this 6th day of December, 2001.

BY ORDER OF THE  
STATE TAX APPEAL BOARD

( S E A L )

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GREGORY A. THORNQUIST, Chairman

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JEREANN NELSON, Member

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MICHAEL J. MULRONEY, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 6th day of December, 2001, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

Charles E. Wolfe  
Mountain Pack, Inc.  
1936 Northridge Circle  
Billings, Montana 59102

Doug Peterson  
Sub Process Lead  
Compliance, Valuation and Resolution Process  
Montana Department of Revenue  
P.O. Box 35013  
Billings, Montana 59107

Mary Bernhardt  
Auditor  
Compliance, Valuation and Resolution Process  
Montana Department of Revenue  
624 North 24<sup>th</sup> Street  
Billings, Montana 59101

Office of Legal Affairs  
Department of Revenue  
Mitchell Building  
Helena, MT 59620

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DONNA EUBANK  
Paralegal